UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHERILYN DAVIS,

Plaintiff,

Civil No. 03-74576
Hon. John Feikens

v.

EASTERN MICHIGAN UNIVERSITY,

Defendant.

_____/

OPINION AND ORDER

Plaintiff appears before this Court in propria persona and does not clearly state her claims. It appears that Plaintiff is attempting to allege a claim under 28 U.S.C. § 1983, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e)) ("Title VII") and Michigan's Elliot-Larsen Civil Rights Act (M.C.L.A. § 37.2101). Defendant moves for summary judgment. For the reasons below, I GRANT defendant's motion for summary judgment, pursuant to Fed. R. Civ. P. 56.

I. FACTUAL BACKGROUND

Plaintiff, Cherilyn Davis, appears before this Court in propria persona. Plaintiff alleges that Defendant, Eastern Michigan University ("EMU"), her employer, reprimanded her in retaliation for complaining about a supervisor. Plaintiff further alleges that EMU created a hostile work environment and later fired her. Plaintiff implies that EMU's reason for termination, her failure to return from personal leave, is merely a subterfuge to conceal EMU's

true motivation of race discrimination.

Plaintiff was employed as a secretary within EMU's Office of Collaborative Education. (Def. Answer at Exhibit A). On August 14, 1998, Plaintiff received a poor work performance evaluation. Id. The employee evaluation claimed that Plaintiff worked at an unacceptably low level, failed to meet deadlines and that she demonstrated rude and inappropriate behavior. Id. Plaintiff signed this evaluation on August 14, 1998. (Pl. Compl. at Exhibit 25b).

Plaintiff contacted her union in response to the evaluation and in response to her "supervisor's attitude." (Pl. Compl. at 1). According to Plaintiff she had previous received good evaluations, yet her new supervisor, Michael Bretting, was incorrectly holding her accountable for mistakes at work. Id. at 2. Plaintiff continued to contact her union apparently to complain about her supervisor. Id.

Plaintiff claims that her other supervisor, Georgea Langer, began to harass her in response to Plaintiff's complaint. Id. at 3. Plaintiff contacted her union again, and also attempted to contact "the Affirmative Action office." Id. Plaintiff also claims that she sought a transfer within EMU but was unable to relocate because of her previous poor evaluation. Id. at 4. Defendant claims that Plaintiff's performance evaluation did not prevent her from applying for other open jobs within EMU. (Def. Answer ¶ 14).

Plaintiff claims that she sought out assistance from EMU's attorney's office and the vice-president of EMU. (Pl. Compl. at 4). Plaintiff alleges that she was denied

assistance because her "complaint was against a white woman." Id.

Plaintiff claims that she met with her union but it would not help her with her work related problems. Id. at 5. Additionally, Plaintiff claims that she docked 8 hours of pay because she was using her vacation time to meet with her union. Id. Defendant claims that Plaintiff loss of pay was due to her attempt to manipulate her leave hours without supervisor approval. (Def. Answer ¶ 16).

Plaintiff claims that on September 9, 1998, she took a personal leave of absence while she waited to hear from "the Affirmative Action Office." (Pl. Compl. at 5). EMU terminated Plaintiff on September 17, 1999, for her "failure to return to work at the expiration of [her] leave of absence." Id. at Exhibit 37.

Plaintiff filed this suit November 14, 2003. On July 15, 2004, Defendant filed a motion for summary judgment on all counts.

II. ANALYSIS

A. Motion for Summary Judgment Standard

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material only if it might affect the outcome of the case under the governing law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505 (1986). The court must view the evidence and any inferences drawn from the evidence in a light most favorable to the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio

Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citations omitted), Redding v. St. Edward, 241 F.3d 530, 532 (6th Cir. 2001).

The burden on the moving party is satisfied where there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). In order for a claim to survive a motion for summary judgment, the respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, "[w]here the record taken as a whole could not lead a rational trier of fact to find" for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is plausible. Betkerur v Aultman Hospital Association,78 F.3d 1079, 1087 (6th Cir. 1996). See also, Street v J.C. Bradford & Co.,886 F.2d 1472, 1479-80 (6th Cir. 1989).

B. Plaintiff's Claims

1. Civil Rights Claim, 28 U.S.C. § 1983

It appears that Plaintiff is attempting to allege a claim under 28 U.S.C. § 1983. (Pl. Compl. at 1, 3). Plaintiff, however, fails to state a claim upon which relief can be granted.

Plaintiff implies in her complaint that EMU had mixed motives when it fired her. Plaintiff states, "I am suing Eastern Michigan University for retaliating against me when I filed a complaint against my supervisor." Id. at 1. She alleges that she confronted "discrimination" and implies that EMU, motivated by "institutionalize [sic] racism,...wrongfully fired" her. Id. at 1, 3. Defendant contends, however, that it fired

Plaintiff for failure to return to work after her one year personal leave expired. (Def. Answer ¶ 18).

Plaintiff requests a remedy of "monetary damages (loss wages and benefits, educational opportunities, personal damages) [sic]." Id. at 1.

The eleventh amendment of the U.S. Constitution prohibits, with few exceptions, individuals from suing the states in federal court. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 145 (2000). Congress, when it passed 42 U.S.C. § 1983, did not remove the states' eleventh amendment immunity. Wolfel v Morris, 972 F.2d 712, 718 (6th Cir. 1992). Therefore, a state is not a "person" subject to suit under that statute. Id. The university, as an arm of the state, is also immune, under the eleventh amendment, from a suit for civil rights claims under 42 U.S.C. § 1983. John v. University of Cincinnati, 215 F.3d 561, 571 (6th Cir. 2000).

In the case at hand, Plaintiff appears to allege a free speech retaliation claim and a racial discrimination claim under 28 U.S.C. § 1983. Plaintiff, in her action against the state of Michigan, improperly requests monetary damages. Therefore, I grant summary judgment in favor of Defendant on this claim for monetary damages.

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)

It also appears that Plaintiff is attempting to allege a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-2 ("Title VII"). (Pl. Compl. at 1, 3). Plaintiff, however, fails to state a prima facie case of unlawful retaliation or discrimination.

(i). Discrimination Claim

A plaintiff, to establish a Title VII discrimination claim, must either present direct evidence of discrimination or introduce circumstantial evidence that would allow an inference of discriminatory treatment. Johnson v. Kroger Co., 319 F.3d 858, 864-865 (6th Cir. 2003). If the plaintiff presents direct evidence of discriminatory intent in connection with a challenged employment **action then** the employer bears the burden of production and persuasion to prove that it would have terminated the employee "even if it had not been motivated by impermissible discrimination." Id. citing Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000).

A plaintiff who presents circumstantial evidence must establish a prima facie case of discrimination. Johnson v. University of Cincinnati, 215 F.3d 561, 572 (6th Cir. 2000). Plaintiff, in order to establish a prima facie case, must show that (1) she belongs to a racial minority; (2) that she applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite her qualifications, she was rejected; and (4) that, after her rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

A plaintiff who establishes a prima facie case creates a rebuttable presumption of discrimination. Johnson v. Kroger Co., 319 F.2d at 866. Defendant then must show a "legitimate, nondiscriminatory reason" for committing the challenged action. Id. citing Johnson v. University of Cincinnati, 215 F.3d at 573. Where defendant satisfies this burden the plaintiff then must prove that defendant's reason is actually a pretext to

cover up unlawful discrimination. Id. citing Johnson v. University of Cincinnati, 215 F.3d at 573.

Direct Evidence of Discrimination

Plaintiff does not present any direct evidence of EMU's direct intent to discriminate. Plaintiff presents an e-mail, that she wrote, to prove EMU's discriminatory motives. (Pl. Compl. at 3, Exhibit 18A). However, Plaintiff's evidence does not support her position and is actually counterproductive. Id. The evidence only shows that Plaintiff knew that EMU believed Plaintiff's performance at work was deteriorating and EMU was disappointed with her attendance nearly a year before she was fired. Id. The evidence proves the Plaintiff knew EMU viewed Plaintiff as a substandard employee. Id. at Exhibit 25A. Therefore, Plaintiff may not proceed on a Title VII claim through the direct evidence prong, because she produces no direct evidence of EMU's intent to discriminate.

Circumstantial Evidence of Discrimination

Plaintiff does not present evidence of a prima facie case of discrimination. Plaintiff's complaint does not establish that she belongs to a racial minority. However, considering Plaintiff's claims of "racism," an inference that Plaintiff is a racial minority does not appear unreasonable. (Pl. Compl. at 1, 3). Besides, Plaintiff does provide evidence that she is a racial minority in her response to Defendant's motion for summary judgment. (Pl. Resp. to Mot. for Summ. J. Exhibit A-2). Plaintiff, however, fails to establish any other element.

Plaintiff was not qualified for her job. Plaintiff had applied and had at one time been qualified for the position of Senior Secretary. (Def. Answer at 1). However, Plaintiff's own evidence tends to show that Plaintiff was not qualified and was actually a substandard employee. (Pl. Compl. at Exhibit 25a). Although Plaintiff submits evidence that her supervisor, Dr. Georgea M. Langer, said Plaintiff "runs everything so well," the quoted phrase is taken from an article nearly two years before Plaintiff was fired. (Pl. Compl. at Exhibit 9). Plaintiff provides no evidence that she remained qualified for the position towards the end of her career at EMU, and actually provides evidence to the contrary. Therefore, Plaintiff fails to establish the second element of a prima facie case.

Plaintiff fails to present evidence that EMU terminated her "despite [her] qualifications," McDonnell Douglas Corp., 411 U.S. at 802, in fact Plaintiff's evidence supports Defendant's contention that she was fired because of her failure to return to work. Defendant and Plaintiff both provide evidence that EMU terminated Plaintiff for her failure to return to work after her leave of absence expired. (Pl. Compl. at Exhibit 37); (Def. Mot. for Summ. J. at Exhibit 16). Both parties also provide evidence that leading up to Plaintiff's termination she was no longer qualified to hold the position. (Pl. Compl. at Exhibit 25a); (Def. Mot. for Summ. J. at Exhibit 11).

Plaintiff does not present any evidence regarding the fourth element for a prima facie case. In order to state a Title VII discrimination claim Plaintiff needs to allege in her complaint that the position remained open and EMU continued to seek applicants

from persons of Plaintiff's qualifications. McDonnell Douglas Corp., 411 U.S. at, 802. Plaintiff presents no allegations or evidence regarding this element.

Plaintiff fails to present sufficient facts to support her Title VII discrimination claim. Therefore, I grant summary judgment in favor of Defendant on this claim.

(ii). Retaliation Claim

A plaintiff, to establish a Title VII retaliation claim, must show: (1) that she was engaged in activity protected under Title VII; (2) that she was the subject of an adverse employment action; and (3) that there is a causal link between the protected activity and the adverse employment action. Johnson v. U.S. Dept. of Health and Human Services, 30 F.3d 45, 47 (6th Cir. 1994). In order to establish the causation element Plaintiff must show that her participation in a protected activity was a "significant factor," contributing to her employer's adverse employment action. Polk v. Yellow Freight System, Inc., 801 F.2d 190, 199 (6th Cir. 1986).

In this case, Plaintiff alleges that EMU denied her a promotion, in retaliation for filing a complaint against her supervisor. (Pl. Compl. at 1, 4). This retaliation claim fails because Plaintiff does not elucidate a causal link between the protected activity and the adverse employment factor.

Plaintiff engaged in an activity protected under Title VII. Plaintiff filed a complaint against her supervisor alleging harassment on the basis of Plaintiff's race. (Pl. Compl. at 3, 4). It is unlawful for an employer "to discriminate against any of his employees... for employment... because he has opposed any practice made an unlawful

employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title." 42 U.S.C. § 2000(e)-3(a). Therefore, Plaintiff engaged in a Title VII protected activity when she filed a complaint against her employer.

Plaintiff demonstrates that EMU subjected her to an adverse employment action. Plaintiff provides evidence that EMU terminated her employment. (Pl. Compl. at Exhibit 37). The Seventh Circuit found that termination is a materially adverse employment action. EEOC v. University of Chi. Hosps., 276 F.3d. 326, 331 (7th Cir. 2002). Therefore, Plaintiff has established the second element of the prima facie retaliation claim by demonstrating that EMU subjected her to an adverse employment action.

Plaintiff does not show the last element of a prima facie case, the existence of a causal link between the protected activity and the adverse employment action. Johnson v. U.S. Dept. of Health and Human Services,, 30 F.3d at 47. Plaintiff impliedly alleges that EMU terminated her employment because she filed a complaint of racial discrimination against her supervisor. (Pl. Compl. at 4). Defendant does not agree with Plaintiff and states that Plaintiff was fired because of her failure to return to work. (Def. Answer ¶ 17). Plaintiff's own evidence supports Defendant's position.

Defendant and Plaintiff both provide evidence that EMU terminated Plaintiff for her failure to return to work after her one year leave of absence expired. (Pl. Compl. at Exhibit 37); Def. Mot. for Summ. J. at Exhibit 16). Both parties also provide evidence

that leading up to Plaintiff's termination she was no longer qualified to hold the position. (Pl. Compl. Exhibit 25a); Def. Mot. for Summ. J. at Exhibit 11). Plaintiff, therefore, does not demonstrate the causal link required to establish a prima facie case of a Title VII retaliation claim.

Plaintiff does not present sufficient facts to support her Title VII retaliation claim. Therefore, I grant summary judgment in favor of Defendant on this claim.

3. Michigan Elliott Larsen Civil Rights Act Claim

Plaintiff does not clearly state whether she is alleging a violation of the Michigan Elliot-Larsen Civil Rights Act, M.C.L.A. § 37.2101 *et seq.* ("CRA"). However, the Michigan Statute of Limitations bars Plaintiff from bringing such a claim. Plaintiff has three years to bring an appropriate action under the CRA. Womack Scott v. Dep't of Corr., 630 N.W.2d 650, 653 (Mich. Ct. App. 2001); M.C.L. §600.5805(10). The limitations period runs from the date that the employee was discharged from the job. Womack Scott, 630 N.W.2d at 653.

EMU discharged Plaintiff on September 17, 1999. (Pl. Compl. Exhibit 37). Plaintiff filed her claim November 14, 2003. (Pl. Compl.). The time between when she had a right to bring her claim and when she actually filed her claim is greater than three years. Therefore, the Michigan Statute of Limitations bars Plaintiff from bringing such a claim. Therefore, I grant summary judgment in favor of Defendant on this claim.

III. CONCLUSION

A plaintiff may bring a discrimination claim in three ways: (i) a Civil Rights

Claim, 28 U.S.C. § 1983, (ii) a Title VII discrimination or retaliation claim, or (iii) an Elliott Larsen Civil Rights Act Claim.

Plaintiff fails to state a Civil Rights Claim, 28 U.S.C. § 1983, upon which relief can be granted, therefore, I grant summary judgment in favor of Defendant on this claim. Plaintiff fails to plead a prima facie case for either a Title VII discrimination or retaliation claim, therefore, I grant summary judgment in favor of Defendant on these claims. Plaintiff brought her Elliott Larsen Civil Rights Act Claim after her time expired, therefore, I grant summary judgment in favor of Defendant on this claim. Therefore, I GRANT summary judgment in favor of Defendant on all of Plaintiff's claims.

IT IS SO ORDERED.

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John Feikens
United States District Judge

Date: _____